and went to the office of the respondent whom he also could not see. He therefore placed P22 on the window-sill with a request to one Valaithen to hand it to the respondent and pass it to the collector.

Haji Mohamed Akram is the chief clerk in the office of the Chief Port Manager and obviously cannot be described as a member of the public. He himself gave a betting slip on horses to the respondent with $10. But he states, and he was a witness for the prosecution, that he gave it to the respondent on the verandah of the office. That was on the 23rd October, 1954. As regards access to the office, this witness stated that "no public is allowed to come into the office without permission. The second witness (Mr. Wield) gave me this instruction." Other Railway clerks were allowed to come in with the chief clerk's permission. In re-examination he said: "Members of the public having business to transact are allowed into the office and they are immediately taken to Mr. Wield. We are very strict about members of the public coming to the office."

It is quite clear from the evidence given by the prosecution witness that the general public have not got access to this office. I am doubtful whether there is evidence to prove that members of the public having business with this office have access to it as of right. However that may be, in order to support a conviction under the first charge the prosecution must show that such persons, if any, who had the right of access were a class of the public. Having considered the meaning of the word "class" in the Concise Oxford Dictionary, I have come to the conclusion that persons having business with a certain office, even if they have access, are not a class of the public.

In these circumstances I think the learned Magistrate was quite right in holding that the prosecution had failed to show that the office of the Chief Port Manager was used on the 23rd October, 1954 as a common betting house.

The first alternative charge is as follows:—

"That you on or about the 23rd day of October, 1954, at Kuala Lumpur in the State of Selangor acted as a book-maker in the office of the Chief Port Manager, Malayan Railway, a place to which the public is suffered to have access and that you thereby committed an offence contrary to section 6(3)(b) and punishable under section 6(3) of the Betting Ordinance, No. 47 of 1953."

It is to be noted that the respondent is charged with acting as a book-maker in the office of the Chief Port Manager, a place to which the public is suffered to have access. Whether or not one reads that charge as meaning "the public or any class thereof" it follows from my decision on the first charge that I agree with the learned Magistrate that there was no evidence to justify a conviction on the first alternative charge.

The second alternative charge is as follows:—

"That you on or about the 23rd day of October, 1954, at Kuala Lumpur in the State of Selangor assisted in carrying on a public lottery, namely, 100 and 1000 character lottery and that you thereby committed an offence contrary to section 4(1)(c) and punishable under section 4(1) of the Common Gaming Houses Ordinance, No. 26 of 1953."

The only question which arises is whether on the evidence there is a *prima facie* case that the respondent was assisting in carrying on a public lottery. It is not alleged that the lottery was carried on in the Chief Port Manager's office and there can be no doubt, if "tikam ekor" is a lottery, the respondent was assisting in carrying on a public lottery by reason of the other definitions of lottery and public lottery in section 2 of the Ordinance. A lottery includes any game, etc., whereby money or money's worth is distributed or allotted in any manner depending upon or to be determined by chance or lot.

It is quite clear from the evidence of the expert that, so far as "tikam ekor" is concerned, the punter, if he won, expected $70 from the bookmaker on each ticket in the 100 character, and $700 on each ticket in the 1,000 character. This money was to be paid out irrespective of how much money had been collected. It does not appear to me that this payment out to the punter can be described as a distribution. In the meaning to be ascribed to the word "distribute" it is stated in the Concise Oxford Dictionary, *inter alia*, that it means "to give a share to each of a number", and again, "to divide into parts". That, it would appear to me to apply to a case of the distribution of a fixed sum of prize money but not to the payment by a bookmaker on a bet, whether or not the bet is on a race horse or on a number to be ascertained by chance. So far as the word "allotted" is concerned, the same dictionary states that it means "the distribution by lot", so that we come back, to the meaning of the word "distribute".

In my view, the learned Magistrate was right in the conclusions to which he came in respect of each of the three charges, and the appeal is therefore dismissed.

Appeal dismissed.

KOAY CHOOI v. REGINA

[A. Cr. J. (Spenser Wilkinson J.) August 16, 1955]

[Penang — Criminal Appeal No. 23 of 1955]

Children and Young Persons Ordinance, 1947, s. 26(1) — Unlawfully transferring permanently the control of a child for valuable consideration — Evidence of accomplices — Failure of trial Magistrate to consider

whether witnesses were accomplices and whether there was corroboration — Witness discredited by proof of an inconsistent earlier statement to the Police — Criminal Procedure Code (Cap. 21), s. 124.

This was an appeal against the conviction of the appellant on a charge of unlawfully transferring permanently the control of her child for valuable consideration contrary to s. 26(1) of the Children and Young Persons Ordinance. It appeared that the learned Magistrate failed to consider whether some of the witnesses who gave evidence were accomplices and whether or not there was independent corroboration which would justify him in accepting their evidence. The prosecution in this case put in a statement made in the course of a Police Investigation to a witness in order to discredit him. The learned Magistrate nevertheless relied on the evidence of this witness.

Held: (1) as the learned Magistrate had failed to direct himself on the question of whether the witnesses were accomplices and if so whether there was corroboration and as the Appellate Court was not satisfied that such failure had not occasioned a failure of justice, the conviction must be quashed; (2) the learned Magistrate was wrong in giving weight to the evidence of the witness, who had been discredited by proof of an inconsistent earlier statement to the Police.

Cases referred to:—

(1) *Davies v. Director of Public Prosecutions* (1954) 1 All E.R. 507.

(2) *Tan Yook Suan v. R.* (1954) M.L.J. 116.

MAGISTRATE'S CRIMINAL APPEAL.

Lee Kok Liang for the appellant.

D. C. Jackson (Sr. Federal Counsel) for the respondent.

Spenser Wilkinson J.: — The appellant was charged with unlawfully transferring permanently the control of her child Choo Ah Lew to one Tan Hee Boon for valuable consideration, to wit $300 cash, contrary to section 26(1) of the Children and Young Persons Ordinance, 1947.

The case for the prosecution rested to a large extent upon a written document whereby one Koay Ah Sian purported to sell her daughter to Tan Boon Chin for $300. This document bore the thumb print of one Koay Sian Nee as seller of the child; the thumb print of Ah Hoe Neo (f) as introducer; the signature of Lee Keng Jin as introducer; and the signature of Ong Teng Khoe as go-between. At the foot of the document, which is dated 20th December 1943 and also 10th December 1953, it is stated: "Koay Ah Sian is the maker of the document of sale of 'child".

In addition to the Investigating Officer the witnesses called for the prosecution were the three signatories to this document, namely Ah Hoe Neo, Lee Keng Jin and Ong Teng Khoe; the alleged vendor Tan Hee Boon, Tan Hee Boon's wife and the child in question.

It was contended on the appeal that the signatories to the document and the purchaser were accomplices, and that the learned Magistrate had failed to direct his mind to this point. Before dealing with this ground of appeal, however, I propose to deal with another ground of appeal, which was to the effect that when the prosecution sought to put to the 1st Prosecution Witness a statement made in the course of the Police investigation the learned Magistrate failed to supply a copy thereof to the appellant. In my view this was a serious irregularity and had the 1st Prosecution Witness been the only witness to the facts to which he deposed it would in my opinion have been fatal to the prosecution case. As, however, the gist of the evidence given by this witness was also given by other witnesses I do not think that this irregularity in fact made any difference in this particular case. What is perhaps more important is that this witness having been discredited by proof of an entirely inconsistent statement to the Police the learned Magistrate appears to have given some weight to his evidence, which in my opinion he should not have done.

Coming back to the question of accomplices it was contended on behalf of the Crown that the signatories to the document in question were in fact not accomplices, because they did not know the contents of the document they were witnessing, or if they did were under the impression that it was a legitimate arrangement in contemplation of marriage within the meaning of sub-section (3) of Section 26 of the Children and Young Persons Ordinance, 1947. I do not think this argument can apply to the purchaser of the child or to his wife, who I think must be assumed to have known what was going on; nor to P.W. 5, the alleged maid servant of the appellant who nowhere suggested in her evidence that she thought the transaction had anything to do with marriage or adoption.

With regard to the witness Ong Teng Keng, who lives with the appellant (who is his mistress) the learned Magistrate has given no indication as to whether he believed that what was read out to him was something different from the document produced. The question whether he was an accomplice therefore remains in doubt.

I think it is clear, therefore, that all these witnesses were at least *prima facie* accomplices and that the learned Magistrate entirely failed to consider this question or the question of whether or not there was independent corroboration which would justify him in accepting their evidence.

The next question was whether an Appellate Court, if satisfied that there was in fact corroboration, can uphold the conviction in spite of the fact that the Lower Court has not directed itself at all on the question of accomplice evidence. Although I believe

there are cases where this has been done, in my opinion the rule laid down by the House of Lords in the case of *Davies v. Director of Public Prosecutions*[1] should be followed, as it was by Murray-Aynsley C.J. in *Tan Yook Suan v. Reg.*[2]. One of the propositions there laid down (*per* Lord Simon L.C. at page 513) is this :—

"Where the Judge fails to warn the jury in accordance with this rule the conviction will be quashed, even if in fact there be ample corroboration of the evidence of the accomplice, unless the Appellate Court can apply the proviso to section 4 of the Criminal Appeal Act, 1907."

In applying this rule to appeals from Magistrates' Courts in this country I would substitute for the last part of the sentence above quoted the following :—

"Unless the Appellate Court is satisfied that such failure has not occasioned a failure of justice within the meaning of section 448 of the Criminal Procedure Code."

The question of accomplice evidence was not the only difficulty in this case. No evidence was called and no attempt was made to identify the names "Koay Ah Sian" and "Koay Sian Nee" appearing in the written document with the appellant Koay Chooi. Moreover, only one of the witnesses to the document who was called gave evidence that the appellant signed the document produced, and this evidence was given in very general terms, when the witness said :—

"Then they all signed or put their thumb impression".

So that the question whether this document constituted corroboration was also left to a large extent in the air.

In all the circumstances of this case I was far from satisfied that there was ample corroboration of the evidence of these witnesses who at least appear to have been accomplices. I use the expression "appear to have been" advisedly because if the learned Magistrate had set his mind to the point he might, after seeing and hearing these witnesses, have concluded that some of them were not accomplices.

Owing to the failure of the learned Magistrate to direct himself on the question of whether these witnesses were accomplices and if so whether there was corroboration I felt I had no alternative but to set aside the conviction. I therefore ordered that the appellant be retried before another Magistrate.

Re-trial ordered.

Solicitors for the appellant: *Ong Huck Lim & Co.*

ARIFFIN MOHAMED ARIFF v. REGINA

[A. Cr. J. (Spenser Wilkinson J.) August 16, 1955]

[Penang — Criminal Appeal No. 24 of 1955]

Criminal Procedure Code (Cap. 21), s. 74 — Binding over a complainant — Need for positive evidence that complainant is likely to commit a breach of the peace.

In this case the accused in the proceedings was charged with assault upon the complainant. The accused was the caretaker of a mosque of which the complainant was the manager. It appeared that the quarrel between them arose because the complainant had given permission to his niece to stay for a few days in the Imam's room at the mosque, of which he was the manager. The defendant objected to this on the ground that in his view under Islamic law no woman can live in a mosque. When the complainant gave evidence he was cross-examined by Counsel for the accused who suggested to him, *inter alia*, that under Islamic law no woman could live at a mosque and that he (the complainant) was in fact the aggressor. These matters the complainant definitely denied. There was no proof of the law or custom alleged by the accused. The learned Magistrate bound over the complainant under s. 74 of the Criminal Procedure Code. The complainant appealed against this order.

Held: an order under s. 74 of the Criminal Procedure Code must be based upon positive evidence that the complainant unless restrained is likely to cause a breach of the peace and cannot be based upon suggestions put to a witness in cross-examination which that witness repudiates or upon submissions made by Counsel unsupported by evidence.

MAGISTRATE'S CRIMINAL APPEAL.

Appellant in person.

D. C. Jackson (Sr. Federal Counsel) for the respondent.

Spenser Wilkinson J. : — This was an appeal by the complainant in proceedings in the Magistrate's Court against an order by the learned Magistrate binding him over under section 74 of the Criminal Procedure Code in the sum of $50 for six months to keep the peace.

The accused in the proceedings was the caretaker of a mosque of which the complainant is the Manager. He was charged with assault upon the complainant under section 352 of the Penal Code. The quarrel between the complainant and the accused arose out of the complainant having given permission to his niece to stay for a few days in the Imam's room at the mosque, of which he was the Manager. The defendant objected to this upon the ground that in his view under Islamic law no woman can live at a mosque.

The complainant when he gave evidence was cross-examined at considerable length by Counsel, who quite properly put a number of suggestions to him, amongst them being that under Islamic law no woman could live at a mosque and that he the complainant was in fact the aggressor. These matters the complainant definitely denied. Suggestions of this kind made to a witness in cross-examination may well affect his credit by reason of the manner of his denial or his general demeanour when under cross-examination; but even if the witness is completely discredited this does not prove the suggestions made to him (unless he admits them) or even make them evidence. There was thus no evidence before the learned Magistrate with regard to the Islamic custom alleged and yet he found as a fact that the appellant's action in allowing the woman to go